71-1474

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MICHAEL RODAK, JR

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No.

ALBERT B. EASON, ET AL.,
Petitioners,

versus

LENA VERN DANDRIDGE, ET AL.,
Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

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INDEX

Page

Jurisdiction 2

Opinions 2

Questions Presented 2

Statutes Involved 3

Statement of the Case 3

Specification of Errors to be Urged 4

Argument 5

Conclusion 12

Proof of Service 14

Appendix A (District Court Order) 1a

Appendix B (Court of Appeals Decision) 7a

CITATIONS

Swann versus Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 28 L. Ed. 2d 554 (1971) 2, 3, 4, 5, 7, 9, 10, 11

Brown versus Board of Education, 347 U.S. 483 (1954) 2, 6, 9, 12

STATUTES

42 U.S.C.A. Section 2000-C-6(a) 2, 3, 9

20 U.S.C.A. Section 1232 a 3, 10

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1971

No.

LENA VERN DANDRIDGE, ET AL.,
Plaintiffs-Respondents,

versus

JEFFERSON PARISH SCHOOL BOARD, ET AL.,
Defendants-Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Albert B. Eason and others, Intervenors, respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Court to review the decision of the United State Court of Appeals for the Fifth Circuit in No. 71-2542 rendered on February 11, 1972, which affirmed an earlier Judgment by the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, in civil action number 14,801, granting Respondent further relief as originally prayed for.

JURISDICTION

The Judgment of the Court of Appeals (Appendix B) was entered February 11, 1972.

Jurisdiction to review this case upon Writ of Certiorari is authorized and created by U.S.C.A. title 28, Section 1254 (1).

OPINIONS

The Order of the District Court is printed in Appendix "A"; the opinion of the Court of Appeals for the Fifth Circuit is printed in Appendix "B".

QUESTIONS PRESENTED

1. Whether 20 U.S.C.A., Section 1232a and 42 U.S.C.A., Section 2000-C-6 are applicable in furtherance of Brown 1 as cited in Swann versus Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 28 L.Ed. 2d 554 (1971).

2. The question of "de facto" segregation on a limited scale as a result of housing patterns as the sole basis for compulsory busing after a unitary system has been in operation with full cooperation of the local School Board.

3. The legality of compulsory busing where a unitary school system has achieved approximately eighty percent full integration of students and total integration of faculty, transportation, and extra curricular activities.

4. Whether the District Court properly interpreted and applied the broad provisions of Swann (supra).

STATUTES INVOLVED

Pertinent provisions of title IV of the Civil Rights Act of 1964, Section 2000C-6(a) and 20 U.S.C.A., Section 1232a.

STATEMENT OF THE CASE

Plaintiffs' original petition filed in July, 1964, sought an end to the dual school system in Jefferson Parish, including the assignment of students and faculty. A freedom of choice plan was adopted and fully implemented.

Plaintiffs sought further relief in 1968 and a unitary system was prepared and implemented by the School Board on non-racial geographical zones. The District Court adopted the School Board plan, complemented the School Board for its cooperation, and the unitary system was operationally successful.

Immediately following the Swann (supra) decision, plaintiffs sought further relief asking that every school in the Parish achieve a set 65-35 white black pupil ratio (the actual ratio was 80-20), and faculty assignments comparable to the system-wide faculty white black composition. Plaintiffs' last petition is the subject of this appeal and obviously relies on the broad language in Swann.

The District Court ordered the School Board to submit a new plan in accord with the Swann decision. An intervention was filed by Albert B. Eason and approximately fourteen thousand (14,000) parents (black and white) opposing compulsory busing of students.

In August, 1971, the District Court withdrew the freedom of choice concept and ordered a new plan which changed every School District, ordered compulsory busing beyond district lines for approximately three thousand (3,000) students, which further required transfers of approximately ten thousand (10,000) students, because of the new districts.

The District Court denied a stay order on August 13, 1971, the Fifth Circuit Court of Appeals denied a stay order on August 23, 1971, and Justice Thurgood Marshall denied a stay order on August 30, 1971.

The matter was considered by the United States Court of Appeals for the Fifth Circuit by briefs and the District Court order was affirmed on February 11, 1972.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the Fifth Circuit erred and misdirected itself in affirming the District Court's Order, as follows:

1. Finding "de facto" segregation because nineteen (19) out of seventy five (75) schools remained uniracial under the Court approved unitary system adopted in 1969.

2. In granting plaintiffs relief with a new school plan to achieve "racial balance" which in turn would eliminate racial identification of *any* particular school.

3. In holding that the remaining one race schools which existed under the unitary system previously approved by the District Court were discriminatory and not as a result of voluntary housing patterns in Jefferson Parish.

4. Invoking Judicial powers contrary to Congressional legislation which clearly prohibits transportation of students to overcome racial imbalance and negating any Federal authority over direction, supervision, or control concerning assignment or transportation of students in order to overcome racial imbalance.

ARGUMENT

1. Finding "de facto" segregation because nineteen (19) out of seventy five (75) schools remained uniracial under the Court approved unitary system adopted in 1969.

The main thrust of the District Court's Order was utilizing Swann (supra) to require compulsory busing beyond normal geographical zones because nineteen (19) schools out of the entire seventy five (75) school system remained uniracial. In 1969 the Jefferson Parish School Board prepared and adopted a unitary system disregarding assignment of pupils by race. The system proved highly successful and transition oc-

cured without incident. Faculties were integrated, student bus transportation was integrated, and extra curricular activities were integrated. The only reason that nineteen schools remained basically uniracial was because of housing patterns that existed long before Brown I. The patterns that developed were not within the control of the School Board at any time, but now formed the basis for the District Court to order a complete revamping of every School District, taking three thousand (3,000) children from their home schools and force busing them to distant locations. As a further result of the District Court's Order, aproximately ten thousand (10,000) students were displaced from their home schools and forced to attend new schools in new districts. All of this occured in spite of the good faith efforts of the School Board in achieving a unitary system and in fully complying with every order and request of the District Court. There is no evidence in the record which indicates that segregation or willful discrimination caused the remaining nineteen (19) schools out of seventy five (75) schools to be uniracial.

As stated by Mr. Chief Justice Burger in Swann, pp 571, "The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." This is contrary to the District Court in its reasons for Judgment that "this new plan would achieve racial balance in every school". The District Court also directed that the School Board be guided by the principles of "racial balance". This, too, is contra to Swann.

2. In granting plaintiffs relief with a new school plan to achieve "racial balance" which in turn would eliminate racial identification of any particular school.

The Chief Justice warned that District Courts should not be misguided in their interpretation of Swann. The decision clearly provided that forced busing was not to be used in order to achieve racial balance in all schools. Busing was merely one tool to implement desegregation plans after taking into consideration other factors clearly specified in the decision. The primary objective of the long list of desegregation cases was to eliminate State imposed segregation. Under Brown I to do otherwise was contrary to the Constitution. Remedies sought would be considered by equitable principles. Remedial powers such as compulsory busing ordered by the District Court should be utilized only when there is a finding of a constitutional violation. To do otherwise would allow District Judges to assume full authority over all public schools. The record in this case clearly reflects total cooperation by the Jefferson Parish School Board, full compliance with every request and Order, and the operation of a smooth, unitary system during the past years.

Swann outlines other criteria for consideration, such as the racial composition of teachers and staff, the quality of school buildings and equipment, and extra curricular activities. The record herein is void of any racial identification in these categories.

The Constitution does not require "racial balance" in public schools. This Honorable Court has never ruled

that all black schools in all cities are unlawful. The Swann decision did not require that all School Boards bus children in furtherance of a unitary system.

3. In holding that the remaining one race schools which existed under the unitary system previously approved by the District Court were discriminatory and not as a result of voluntary housing patterns in Jefferson Parish.

As pointed out above, the School Board has absolutely no control over the development of subdivisions and the personal desires of parents to live in particular sections of Jefferson Parish. There is no evidence in the record that schools were intentionally built in particular neighborhoods in order to accommodate either white or black students. To the contrary, the building program of the School Board has consistently been nondiscriminatory and development of the home sites in the Parish were regulated by zoning ordinances and personal desires. Discrimination of any kind should not have been considered as the reason for the few remaining one race schools which existed under the unitary system adopted by the District Court in 1969. Neither the District Court nor the School Board controlled the location of homes or living habits of the parents which have existed in this area for more than one hundred (100) years.

4. Invoking Judicial powers contrary to Congressional legislation which clearly prohibits transportation of students to overcome racial imbalance and negating any Federal authority over direction, supervision, or control concern-

ing assignment or transportation of students in order to overcome racial imbalance.

The language of title IV of the Civil Rights Act of 1964, 42 U.S.C.A., Section 2000c clearly defines and limits the Federal government's participation in further implementation of Brown I. The language is clear and unmistakable, stating: "*Nothing herein shall empower any official or Court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the Court to insure compliance with the constitutional standards*".

The interpretation in Swann of this unambiguous language was clearly erroneous. Section 2000c-6 not only restricts but prohibits the assignment of students to public schools in order to overcome racial imbalance. The prohibition is clear that "*nothing herein shall empower any official or Court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance*". How could Swann conceivably interpret this language as anything but a clear limitation on unreasonable implementation by District Courts in furtherance of Brown I. In fact, Mr. Chief Justice Burger stated "In short, there is nothing in the act (Civil Rights Act) which provides us material assistance in answering the question of remedy for state imposed segregation in violation of Brown I". This being the case, the Court

ignored this legislation, created new "guidelines", and created the new monstrosity called "forced busing" where it clearly had no authority to do so.

Intervenors strongly urge that 20 U.S.C.A., Section 1232 (a) requires re-examination of Swann and reversal of the Court of Appeals decision herein. This statute "Prohibition against Federal Control of Education" provides:

> "No provision of .... the Elementary and Secondary Act of 1965 .... shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school or school system, or over the selection of library resources, text books, or other printed or published instructional materials by any educational institution or school system, *or to require the assignment or transportation of students or teachers in order to overcome racial balance.*"
> (emphasis added)

How can such clear language and intent be ignored? Will District Courts select text books, or perhaps require certain courses in the school curriculum? How far can the Courts go in derrogation of federal prohibitions?

Constant reference must be made to the Swann decision since the District Court relied exclusively upon the broad language contained therein.

The factual situation in the Charlotte-Mecklenburg area in no way resembles the Jefferson Parish system. In Charlotte the District Court found the School Board to be discriminatory; in Jefferson Parish the District Court complemented the School Board for developing and implementing plans which created a unitary system. The Charlotte School Board failed to comply with District Court Orders, and when it did so, its plans were unacceptable. The Jefferson Parish School Board, on very short notice, submitted the present plan in operation (under protest) and fully complied with every order. By contrast, the Charlotte School Board was cited for having "totally defaulted in its acknowledged duty", providing a "loaded game plan", and its failure to cooperate which required the District Court to appoint a qualified expert for assistance.

The geographical distinction between Charlotte and Jefferson Parish should also be noted. The Charlotte area is basically metropolitan with concentrated minority groups in certain areas. Jefferson Parish is strictly suburban and covers a much larger land area. For this reason a few geographical zones existed which allowed the continuance of nineteen uniracial schools. However, the record is clear that school assignments in these areas were genuinely nondiscriminatory and based upon the Court approved plan adopted in 1969.

The Swann decision noted that it is impossible to fix guidelines on a Court's powers, but there are limits

which must be recognized. The simple objective of all school litigation since Brown I is to dismantle the dual school system. This has been accomplished in Jefferson Parish.

CONCLUSION

This petition for Writ of Certiorari filed by Albert B. Eason and others, Intervenors, representing approximately fourteen thousand white and black parents, results from a lack of complete understanding of the Swann versus Charlotte-Mecklenburg Board of Education case. Many other cases have developed and will develop seeking clarification of guidelines and restrictions. It is respectfully submitted that a Writ of Certiorari should be granted to accomplish that end.

The Jefferson Parish School Board has never opposed or taken any action to retard the evolutionary process of Constitutional law requiring conversion to unitary, nonracial school systems. This is especially important today when public education has a crisis of adverse public opinion. Parents are deserting the public school system in favor of private schools. Private schools are basically segregated which in turn retards the effort to create unitary school systems.

Thousands of parents have filed this intervention because they sincerely feel that the District Court Order seriously endangers the public school system of Jefferson Parish. Further, the Order is harmful to the rights, interests, and welfare of the children involved, and will hinder rather than help achieve a unitary nonracial school system.

Future problems can be predicted from the District Court Order. Parents, their friends, associates and other people in the community who realize the injustice of compulsory busing will cause more students to abandon the public schools. This would be the basis for a new Court-Ordered forced busing program which would start a disasterous cycle with the end result even worse than pre-Brown I.

Intervenors use this illustration to argue that unreasonable means such as forced busing to reach a desirable objective can defeat that same objective. The District Court Order endangers the public education system in Jefferson Parish and is adverse to the interest of the parents and students. Therefore, intervenors pray that this Honorable Court will reevaluate the constitutional and educational considerations enunciated in Swann. It is respectfully submitted that the decision of the United States Court of Appeals for the Fifth Circuit, No. 71-2542, and the Judgment of the District Court of the United States, Eastern District of Louisiana, New Orleans Division, Civil Action Number 14801, should be reversed and that the previous Court approved plan for a unitary school system in Jefferson Parish be reinstated.

New Orleans, Louisiana, this ____ day of May, 1972.

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ATTORNEYS FOR
INTERVENORS

PROOF OF SERVICE

In furtherance of the Rules I have served 2 copies of the above and foregoing Petition for Writ of Certiorari upon all parties, by pre-paid mail, addressed to their Counsel, this ____ day of May, 1972.

DENIS A. BARRY II

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

LENA VERN DANDRIDGE

SECTION "A"

versus No. 14,801

CIVIL ACTION

JEFFERSON PARISH SCHOOL BOARD ET AL

ORDER

On May 10, 1971, plaintiffs in this action moved for further relief in their continuing effort to have a truly unitary school system established in Jefferson Parish, Louisiana. The basis of their position is that at present there remain four all-black schools[1] and fifteen all-white, or virtually all-white schools[2] in the Jeffer-

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[1]The all-black public schools and their enrollments are:
Fourth Ward Elementary School (867), Granville T. Woods Elementary School (380), Percy Julian Elementary School (580), and Washington Elementary School (607).
Another all-black school, Avondale Gardens, has been discontinued as of the close of this past school year.

[2]The all-white or substantially all white schools and their enrollments are:
John Quincy Adams Junior High School (1060), T. H. Harris Junior High School (1737), Airline Park Elementary School (915), Alice Birney Elementary School (867), Alexander Elementary School (586), George A. Cox Elementary School (957),

son Parish School System which comprises 75 schools. The relief sought is that this court direct the Jefferson Parish School Board to formulate a new desegregation plan which, through racial balance, would eliminate the racial identification of any particular school. In addition, plaintiffs ask that the faculty of each school be integrated in substantially the same ratio of white to black teachers as exists between white and black teachers throughout the school system and that the School Board henceforth hire new teachers on a non-racial basis.

In the seven years that this court has had jurisdiction over this case, several desegregation orders have been issued to the Jefferson Parish School Board and the school system has made significant accomplishments. During this period the Supreme Court has continued to rule on the meaning and implementation of the equal educational opportunity doctrine required by the Fourteenth Amendment and enunciated in Brown v. Board of Education, 347 U.S. 483 (1954).

In Green v. County School Board, 391 U.S. 430 (1968), the Supreme Court commanded school boards to form-

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J. C. Ellis Elementary School (710), Harvey Elementary School (748), Phoebe Hearst Elementary School (923), Madison Elementary School (1101), Metairie Grammar School (401), Terrytown Elementary School (892), Westgate Elementary School (693), Bissonet Plaza Elementary School (1038) and East End Elementary School (613).

The public school superintendent of Jefferson Parish stated that two other schools, John Clancy Elementary School (848) and Catherine Strehle Elementary School (956), are already scheduled to be substantially integrated in the 1971-1972 school year.

ulate desegregation plans that would realistically and effectively remove de jure school segregation. The immediacy of this command was reiterated in Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969).

It was not until April 20, 1971, however, that the Supreme Court specifically answered the question of what means might be constitutionally utilized "to eliminate from the public schools all vestiges of state-imposed segregation." Swann v. Charlotte-Mecklenburg Board of Education, 91 S. Ct. 1267, 1275 (1971). The evidence adduced since this case was reopened indicates that the Jefferson Parish School System served almost 63,000 pupils in 75 schools during the 1970-1971 school year. Approximately 80 percent of the pupils are white and 20 percent are black. Presently more than 25 percent of the Jefferson Parish public schools are scheduled to remain segregated or virtually segregated in the 1971-1972 school year. These 19 one race schools (four all-black and 15 all-white or virtually all-white) will encompass approximately 13,000 pupils, roughly 21 percent of the total.

While the court feels that the Parish has increasingly realized its legal duty to provide an equal educational opportunity to pupils of all races and that a spirit of cooperation has generally prevailed, the present situation must now be examined in light of *Swann*. The School Board has asserted that a unitary system has been adopted and that further relief is unwarranted because of residential patterns that would necessitate the daily busing of young children over lengthy and unsafe routes in the Parish. In the hearing and con-

ferences thus far held, however, plaintiffs have demonstrated that massive busing is not the only solution available to overcoming the vestiges of the dual school system that previously existed in Jefferson Parish. Plaintiffs have suggested rezoning the present school districts and/or pairing schools in adjacent districts where possible.

The *Swann* decision endorsed various means for the institution of a genuinely unitary system, leaving the means selected within the district judge's discretion so long as the means adopted is an effective remedy. Concerning situations where some integration has taken place but where segregated schools remain, Mr. Chief Justice Burger stated:

> "[I]t should be clear that the existence of some small number of one race, or virtually one race, schools within a district is not in and of itself the mark of a system which still practices segregation by law. The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the e l i m i n a t i o n of one-race schools. No *per se* rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school

> authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part."

91 S. Ct. at 1281.

It is the view of this court that the School Board has not met its burden of justifying the continued existence of such a substantial number of one race schools. It is therefore necessary that the School Board officials of Jefferson Parish devise a remedial desegregation plan that will fully satisfy the constitutional requirements of a unitary system.

While it is the duty and responsibility of the School Board to formulate a constitutionally sound plan, the court suggests that the parties enter into cooperative consultation in order to resolve the current deficiencies as expeditiously as possible. The School Board is to be guided by the racial balance concept, but, in doing so, careful analysis should be given to the neighborhoods of each school district and every effort should be made to preserve geographic zoning criteria where there is no conflict with constitutional requirements. While busing is a permissible tool for school desegregation, and undoubtedly will be necessary to some extent, all parties have stated that there are practical limita-

tions on the extent of any additional busing which might be required. In other words this court feels that busing should be a last resort remedy.

The School Board should therefore consider the modification of existing boundaries of school zones, pairing, and, if necessary, general rezoning. In the future, it might be added, new schools should be strategically located to enhance desegregation.

IT IS THEREFORE ORDERED that the Jefferson Parish School Board, in cooperative consultation with counsel for plaintiffs, formulate a desegregation plan for the public schools of Jefferson Parish. This plan is to comport with the requirements of Swann v. Charlotte-Mecklenburg Board of Education, 91 S.Ct. 1267 (1971), and with the guidelines set forth hereinabove.

The new plan is to be submitted by the School Board to the court for approval not later than August 2, 1971, and it is to be implemented in the forthcoming (1971-1972) school year. While this may place a temporary burden on the School Board, the time for delay is past.

IT IS FURTHER ORDERED that the Jefferson Parish School Board integrate the faculty of each school so that the ratio of white to black teachers in an individual school reflects the ratio of white to black teachers in the school system as a whole.

New Orleans, Louisiana, this 9th day of July, 1971.

_____

UNITED STATES
DISTRICT JUDGE

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2542

LENA VERN DANDRIDGE, ET AL.,
Plaintiffs-Appellees,
versus

JEFFERSON PARISH SCHOOL BOARD, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

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(February 11, 1972)

Before GEWIN, GOLDBERG and DYER,
Circuit Judges.

GEWIN, Circuit Judge: Upon a motion for further relief by Lena Dandridge and the other members of her plaintiff class, the district court ordered the implementation of a new desegregation plan in Jefferson Parish, Louisiana. The Jefferson Parish School Board appeals from that order. We affirm.

In 1969 the district court approved a desegregation plan for Jefferson Parish. In 1971, following the decision in *Swann v. Charlotte-Mecklenburg Board of Education*,[1] plaintiffs filed a Motion for Further Relief. At that time there remained in Jefferson Parish 19 one race schools — 4 all black schools with 2.434 students or 19% of all black students, and 15 all white schools. At the beginning of the 1971-72 school year there were 75 schools and approximately 63,000 students, 80% white and 20% black. In their Motion for Further Relief the plaintiffs asked that every school be required to achieve a white-black ratio more nearly proportionate to the ratio of the entire system and that assignment of faculty members be on a ratio comparable to the system wide faculty composition.

After a hearing on plaintiffs' motion the district court ordered the Jefferson Parish School Board to submit a plan in accordance with *Swann* to be implemented in the 1971-72 school year. In compliance, the School Board submitted a plan to the court, but without recommending that it be adopted. On August 10, 1971, the district court approved the plan submitted by the school board and ordered that it be implemented. The plaintiffs are fully satisfied with the court's order. The order provides for the integration of all 19 formerly one race schools by altering boundaries for elementary and middle school attendance zones and by bussing some 3,000 students. Evidence presented at the hearing showed that the average daily roundtrip distance for the students to be bussed would be approximately 7 miles. The longest round trip distance for any child

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[1] 402 U.S. 1, 28 L.Ed.2d 554 (1971).

was shown to be 14 miles. The plan also provides for the assignment of faculty so that the racial composition of the faculty in each school will be comparable to the system wide ratio.

The School Board contends that the district court erred in requiring "forced bussing" to achieve racial balance and in concluding that the one race schools involved were "vestiges" of the previously operated dual school system rather than the product of voluntary housing patterns.

Swann made clear that bussing is an available tool for use by district courts in achieving school desegregation. In *Swann* 23,000 students were to be bussed,[2] in Jefferson Parish only 3,000; and in *Swann* the average daily round trip was 15 miles,[3] in Jefferson Parish only 7 miles. No serious argument was made or evidence presented which would support a finding that the bussing required here would adversely affect the health of the children or significantly impinge on the educational process.[4] We find no abuse of the district court's equitable discretion with respect to bussing.

Swann placed the burden on school authorities to show that one race schools are "genuinely nondiscrim-

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[2]*Id.* at ——, 28 L.Ed.2d at 574 n.11.

[3]*Id.*

[4]In memoranda submitted to this court in support of the School Board's motion for a stay pending appeal the Board claimed that the logistical problems involved in obtaining the buses necessary to implement the new plan were insurmountable. We denied the stay. The briefs on appeal add nothing to those arguments.

inatory."[5] The district court found that the only evidence presented by the School Board to justify the presence of 19 one race schools in this case "was an allusion to housing patterns." In view of the history of officially sanctioned school segregation in Jefferson Parish, the court concluded that such a bare allegation was without merit. The real thrust of the School Board's argument is a plea for neighborhood schools. But Chief Justice Burger reminded the litigants in *Swann* that, "Desegregation plans cannot be limited to the walk-in school."[6] The district court did not commit error in concluding that the School Board had not met its burden under *Swann* to show that the 19 schools were genuinely nondiscriminatory.

The district court permitted Abert B. Eason and others of his class to intervene on behalf of the School Board. Their brief on appeal raises substantially the same issues as those raised by the School Board. They emphasize that the district judge who granted the motion for further relief was the same judge who in 1969, ordered a plan implemented which he held would establish a unitary school system. Thus, Eason contends that Jefferson Parish already has a unitary school system and that no further relief is required. At the time of the 1969 order the Supreme Court had not made clear the extent of the remedial power available to district courts in dealing with the vestiges of a dual and unconstitutional school system. *Swann* has since provided additional guidance. Whether either the parties or the district court thought the Jefferson Parish

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[5] 402 U.S. at _____, 28 L.Ed.2d at 572.
[6] *Id.* at _____, 28 L.Ed.2d at 575.

system in 1969 was a unitary one is not controlling. *Swan* held that one race schools, as here, which have always been one race schools in a system with a history of segregation are suspect.[7] Seeking to justify the remaining 19 one race schools the intervenors state in their brief:

> The few remaining one-race schools exist solely because of housing patterns prevalent in Jefferson Parish for many years before Brown I was rendered.

It is unquestioned that before *Brown I* there was state imposed segregation in Jefferson Parish. As the district court noted we do not have here schools which have been desegregated and then resegregated by shifting population trends. The argument of the intervenors thus lends support to the district court's finding that the 19 one race schools are in fact "vestiges" of former school segregation.

The intevenors also suggest that 20 U.S.C.A. § 1232 a[8] (Supp. 1971) supports their position. A similar ar-

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[7] *Id.* at ——, 28 L.Ed.2d at 572.

[8] Section 1232a provides:

> No provision of the Act of September 30, 1950, Public law 874, Eighty-first Congress; the National Defense Education Act of 1958; the Act of September 23, 1950, Public Law 815, Eighty-first Congress; the Higher Education Facilities Act of 1963; the Elementary and Secondary Education Act of 1965; the Higher Education Act of 1965; the International Education Act of 1966; or the Vocational Education Act of 1963 shall be construed to authorize any department, agency, officer, or employee of the United States to

gument was made under 42 U.S.C.A. § 2000-C-6[9] and rejected in *Swann*.[10] The result we reach here is not based on § 1232(a) or on our construction of other federal statutes. As stated by the Supreme Court in *Swann:*

> The basis of our decision must be the prohibition of the Fourteenth Amendment that no State shall "deny to any person with its jurisdiction the equal protection of the laws."[11]

The order of the district court is AFFIRMED.

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exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any given educational institution, school, or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system, or to require the assignment or transportation of students or teachers in order to overcome racial imbalance.

[9]Section 2000C-6 authorizes the Attorney General to initiate federal desegregation suits. The portion of the statute relied upon in *Swann* is found in § 2000C-6(a)(2):

> nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

[10]402 U.S. at ——, 28 L.Ed.2d at 567.

[11]*Id.*

COPY

OCT 10 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1474

ALBERT B. EASON, *et al.*,

Petitioners,

—v.—

LENA VERN DANDRIDGE, *et al.*,

Respondents.

No. 71-1601

JEFFERSON PARISH SCHOOL BOARD, *et al.*,

Petitioners,

—v.—

LENA VERN DANDRIDGE, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement	2
Reasons Why the Writ Should Be Denied	5
Conclusion	6
Appendix	1a

Table of Authorities

Cases:

Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969)	4
Brown v. Board of Education, 347 U.S. 483 (1954)	2
Swann v. Charlotte-Mecklenberg Bd. of Ed., 402 U.S. 1 (1971)	2, 4, 5, 6
United States v. Montgomery County Bd. of Ed., 395 U.S. 225 (1969)	3

Statutes:

28 U.S.C. §1254(1)	2
42 U.S.C. §2000c	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1474

ALBERT B. EASON, *et al.*,

Petitioners,

—v.—

LENA VERN DANDRIDGE, *et al.*,

Respondents.

No. 71-1601

JEFFERSON PARISH SCHOOL BOARD, *et al.*,

Petitioners,

—v.—

LENA VERN DANDRIDGE, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

Opinions Below

The opinion in the United States Court of Appeals for the Fifth Circuit is reported at 456 F.2d 552 and the August 13, 1971, opinion of the District Court for the Eastern District of Louisiana is reported at 332 F.Supp. 590. Since the latter opinion is not set out in the appendix

to either of the petitions for certiorari, we have done so in an appendix to this brief.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Question Presented

Whether the decisions of the courts below requiring the implementation of school desegregation plans that would effectively dismantle a dual school system are in accord with this Court's decision in *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971).

Statement

The statements in the Petitions for Certiorari filed by the School Board and by a group of intervenors are noticeably deficient in setting out the facts of this case. Those facts are contained in the opinions of the district court and the Court of Appeals and will be only briefly summarized here.

1. The Jefferson Parish School District was segregated pursuant to the law of the State of Louisiana prior to the decision of this Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). No steps whatsoever were taken to dismantle the dual school system until the filing of the present action in 1964 (ten years after *Brown*.)

2. No desegregation plan in the history of this litigation has been entered voluntarily by the School Board. At every stage the district court has had to require the School

Board to submit a plan that complied with the then current standards for school desegregation plans. The most recent round of this litigation, the one involved here, resulted from the decision of this Court in the *Swann* case.

3. Prior to the present plan the School Board had been operating under essentially a "neighborhood school" plan based on geographic zones. Under that plan 19 of the 75 schools in the system, or 25%, were either all or virtually all of one race. Twenty-one percent of the pupils in the system attended these 19 schools.

4. Similarly, there were substantial imbalances in the racial makeup of faculties in the schools in the system, with many of the schools having faculties that were predominantly of one race.

5. Because the existing plan did not comply with the standards established by this Court in *Swann, United States* v. *Montgomery County Bd. of Ed.*, 395 U.S. 225 (1969), and prior decisions, the plaintiffs filed a motion for further relief requesting that the School Board be required to submit a plan that would take into account the racial makeup of the school system as a whole, that would eliminate the all-one race schools and that would result in the makeup of faculties and student bodies that were reasonably close to the system-wide ratios.

6. The district court, pursuant to the dictates of *Swann*, entered precisely such an order. It took into account racial ratios only for the purpose of assuring the end of one-race or predominantly one-race schools. No rigid racial ratio was fixed or adhered to. Thus, in elementary schools the percentage of black students would range from 10 to 38 percent. In junior highs the range would be from 13

to 40 percent. 332 F.Supp. at 591 (App. to this Brief, p. 2a).

The School Board and the intervenors appealed the order of the district court and it was affirmed by the Fifth Circuit on February 11, 1972. Prior to the affirmance by the Court of Appeals the School Board had asked that court for a stay of the implementation of the district court order. When the Court of Appeals denied the stay, application was made to Mr. Justice Marshall, acting as Circuit Justice for the Fifth Circuit. He denied the stay on August 30, 1971, 404 U.S. 1219, citing *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969), and subsequent decisions. As Mr. Justice Marshall pointed out:

> There are no unusual circumstances in this case. The schools involved have been mired in litigation for seven years. Whatever progress toward desegregation has been made apparently, and unfortunately, derives only from judicial action initiated by those persons situated as perpetual plaintiffs below. 404 U.S. at 1220.

In its February 11, 1972 decision the Court of Appeals held that the district judge in all respects had complied with the requirements of *Swann.* It pointed out that under the plan only 3,000 additional students were to be bused in contrast to the 23,000 bused in *Swann.* Moreover, the average daily round trip in the present case would be only seven miles whereas in *Swann* it would be 15 miles. Thus, under the rule of *Swann* the district court had acted fully within its discretion in fashioning an appropriate remedy to bring about a final end to a dual system of schools.

Reasons Why the Writ Should Be Denied

In essence, the petitioners in both of these cases are asking no more and no less than that this Court reconsider and overrule its unanimous holding in *Swann*. They point to no facts that distinguish the present case from *Swann*. They make the bald assertion that the 19 one-race schools which the district court required to be desegregated were the result of housing patterns over which the School Board had no control. No facts are set out to support this allegation, or to show that these schools, which have always been one race, are not vestiges of the dual system. Therefore, as the district court held, 332 F. Supp. at 594 (App. to this Brief, pp. 6a-7a), the School Board clearly did not comply with the rule of *Swann:*

> Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part. 402 U.S. at 26.

The School Board did not so satisfy the district court and neither of the petitioners here have presented any evidence or any argument that would show that the court's conclusion was erroneous.[1] In short, as the Court of Appeals pointed out, "the real thrust" of the argument of the

[1] As the Court of Appeals pointed out, the school board did no more than make "an allusion to housing patterns." 456 F.2d at 553 (App. to cert. petition in No. 71-1474, pp. 10a-11a).

School Board and the intervenors "is a plea for neighborhood schools." 456 F.2d at 553 (App. to Petition for Certiorari in No. 1474, p. 10a). Such a plea has already been rejected by this Court in *Swann*.

Finally, the petitioners spend some time in rearguing another question laid to rest by this Court's decision in *Swann*, viz., that 42 U.S.C. § 2000c limits the power of federal courts to require transportation in school desegregation cases brought under the Fourteenth Amendment. They present no new arguments and no substantial reasons why this Court's considered judgment on that issue in *Swann* should be abandoned.

CONCLUSION

For the foregoing reasons, the petitions for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Opinion of District Court, August 13, 1971

REASONS FOR RULING

CHRISTENBERRY, *District Judge.*

Pursuant to this court's order of July 9, 1971, the defendant, Jefferson Parish School Board, submitted a new desegregation plan on August 2, 1971, to cover the elementary and middle schools of Jefferson Parish, Louisiana, commencing with the 1971-1972 school year. It was the School Board's opinion that the plan was not educationally sound and not constitutionally required and, therefore, the Board did not recommend the plan. The court has studied the plan and has held open-court hearings on August 7 and 9, 1971, to determine whether the plan complies with constitutional requirements and whether it can feasibly be implemented.

In the school year ending in June, 1971, the School Board was operating 75 public schools in Jefferson Parish, and serving 63,000 pupils. Approximately 80 percent of these pupils are white and 20 percent are black. The evidence presented prior to the order of July 9, 1971 demonstrated that the Parish school system contained 19 one-race or virtually one-race schools, more than one-fourth of the total number of public schools in the Parish. It was further shown that approximately 13,000 pupils or 21 percent of the total, attended these one-race schools. It was this court's opinion then and it is now that the perpetuation of this degree of segregation negated the School Board's argument that it had completely abandoned its dual system of public education.

Under the new plan submitted by the School Board a creditable effort has been made to integrate all public

schools in Jefferson Parish so that no school is racially identifiable. Relying on the information made available by the School Board, the plaintiffs unqualifiedly endorsed the plan and asked that it be adopted by this court. Based on anticipated enrollments, the plan would integrate the Parish elementary schools in varying white-black ratios that range from ten percent black pupils in some schools up to 38 percent black pupils in others. The integration of middle (junior high) schools would vary from 13 percent black pupils to 40 percent black pupils. The court had directed that the School Board be guided by the racial balance principle but at the same time minimize busing and preserve geographic zoning criteria as much as possible by the use of other means of school desegregation. To this end the Board, in formulating its plan, altered boundaries for elementary and middle school attendance zones and thus limited busing to a maximum of an additional 3,000 pupils. The resulting variance in percentages is in this light understood. Racial housing patterns and natural and non-natural geographic barriers also, of course, help explain these variances. Inasmuch as the Parish serves approximately 63,000 pupils, 13,000 of which were formerly in one-race schools, a plan that integrates all previously one-race schools while requiring busing for no more than 3,000 additional pupils, less than five percent of the total, is not considered by this court to place a severe burden on the School Board.

Of these 3,000 additional children that may be subject to busing, the School Board presented evidence to the effect that 90 percent are black. While it would be impermissible for the Board, in complying with a constitutional duty, to place a heavier burden on one race by design, there was no showing of bad faith in this regard. Plaintiffs' counsel, moreover, saw no reason to object to the plan for this (or any other) reason.

Evidence was also received at the August 9th hearing concerning logistical difficulties that the Board anticipates would result from the institution of the new plan. A witness for the Board testified that from 20 to 30 additional buses would be required. It is pertinent, however, that the Parish does not buy or own any of the buses used to transport pupils to and from school. Instead, bus drivers are employed who provide their own buses and they are paid by the state approximately $7,000.00 per annum. The Parish School Board then supplements each driver's salary by $305.00 per annum, meaning that the additional cost in transportation to the Parish, if in fact 30 additional buses are needed, would be approximately $9,150.00. In addition, there was testimony to the effect that new buses are not readily available and that difficulties will be encountered in notifying parents and children of new school assignments. While the court deems this evidence relevant to the feasibility of adopting a new plan, such evidence is not of paramount consideration where constitutional rights are at stake and where the law, for a number of years, has clearly charged school boards "with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Green v. County School Board, 391 U.S. 430, 437-438, 88 S.Ct. 1689, 1694, 20 L.Ed.2d 716 (1968). The fact that a temporary, albeit difficult, burden may be placed on the School Board in the initial administration of the plan or the fact that some schools may not begin the school year in a routinely smooth fashion does not justify in these circumstances the continuation of a less than unitary school system and the resulting denial of an equal educational opportunity to a certain segment of the Parish school children.

Evidence presented at the August 9th hearing also indicated that under the plan the average daily roundtrip dis-

tance for the additional pupils to be bused will be about seven miles as opposed to a previous average roundtrip distance of about two and a half miles for pupils already being transported. One witness testified that the longest roundtrip distance for any child will be 14 miles and that the time for this roundtrip would be one hour. Busing has for many years been widely used in Jefferson Parish due to the suburban and semi-rural nature of the area. It is the practice of the School Board to provide transportation for all pupils living more than a mile from school and for those living less than a mile from school if a safety factor is involved. While the court is cognizant of the complications that can arise from busing young children, the burden in this set of circumstances again does not appear excessive for either the children, their parents, or the School Board. There is little room for doubt that much of the busing which is required in Jefferson Parish is due to the past practices of a dual system, the vestiges of which have lingered on.

As the Supreme Court stated in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 31, 91 S.Ct. 1267, 1283, 28 L.Ed.2d 554 (1971), "[d]esegregation plans cannot be limited to the walk-in-school." In *Swann* the average roundtrip distance that elementary children were transported was twice that of this case. The Supreme Court gave approval to that plan and to busing as a permissible tool of school desegregation. The relevant factors to be considered for the approval of a plan that entails some busing are the time and distance of travel, the age of the pupils, the capacity of the school system to provide transportation, and the extent to which busing has previously been a characteristic of the system. Considering all of these factors, the court finds that the busing called for in the School Board's plan is reasonable and workable.

More importantly, the plan should establish a genuinely unitary school system that will be realistic and effective.

Finally, the School Board, in not recommending the plan, contends that a unitary system has existed in Jefferson Parish since 1969 and that all of the existing one-race or virtually one-race schools are the result of de facto segregation and, therefore, the school system is not susceptible to the type of relief sought by plaintiffs. For the reasons set forth below, this contention is unfounded and erroneous.

It is true that the mandate of the Fourteenth Amendment's equal educational opportunity principle to eliminate dual-system education and to establish workable and effective unitary systems is directed only to de jure segregation. Swann v. Charlotte-Mecklenburg Board of Education, *supra;* Green v. County School Board, *supra;* Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). This mandate, however, does not cease merely because school authorities in a system with a history of school segregation undertake some desegregation, but rather the duty continues until all vestiges of the de jure system are eradicated. While the point at which this occurs may not always be easily discernible, the need for further relief in the Jefferson Parish system is clear. As stated above, the segregation of 19 of the 75 Parish schools has remained intact, meaning that over one-fifth of the pupils served by the Parish remain in a segregated school environment.

Beginning with the 1965-1966 school year, by this court's order, the compulsory dual school system of Jefferson Parish was formally discontinued and a plan was implemented which embodied the freedom-of-choice concept. Because of this plan's ineffectiveness and in accordance with *Green, supra,* this court adopted another plan commencing with the 1969-1970 school year and ordered the Board to operate a unitary, non-discriminatory system. At

that time the extent of the court's remedial power in dealing with the vestiges of a dual and unconstitutional school system was undefined. In the *Swann* decision, however, the Supreme Court squarely confronted this issue and discussed the means that are within the discretionary use of a district court for the elimination of the remnants of state-imposed segregation. The fact that the School Board may have been under the impression that a unitary system was in operation in Jefferson Parish and the fact that the Board complied with the 1969 order is not grounds for a denial of further relief here. "[W]hatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed." *Green, supra,* 391 U.S. at 439, 88 S.Ct. at 1695.

The contention of the School Board that the persistence of one-race schools should be attributed to residential housing patterns and therefore should be labeled de facto segregation is to by-pass the realistic view that the former dual system has never been fully dismantled. That the court now finds that further relief must be granted is not to say that the School Board has not been operating in good faith, but rather it is based upon an evaluation of the system's operations prior to and since 1969 in juxtaposition to *Swann.*

It is the court's duty now to try to ensure that the relief rendered will fully comport with constitutional requirements and thus at last establish a unitary system. To this end the court feels that the one-race schools in the Parish can no longer be tolerated. When a school board undertakes to convert a dual system into a unitary system with the result that a substantial number of one-race schools remain, then it is presumed that the conversion has been incomplete. To rebut this presumption, it was incumbent upon the School Board officials to show that these one-race

schools are "not the result of present or past discriminatory action on their part." *Swann, supra,* 402 U.S. at 26, 91 S.Ct. at 1281.

The only evidence that the school officials mustered to refute this presumption of continued de jure segregation was an allusion to housing patterns. In view of the Parish's past history of officially sanctioned school segregation and because these schools cannot be said to have been desegregated and then resegregated by shifting population trends the court is not persuaded that this is a de facto situation. In reply to the argument that school authorities with a history of de jure segregation need only devise a colorblind assignment plan, the Supreme Court stated in *Swann, supra,* 402 U.S. at 28, 91 S.Ct. at 1282:

> " 'Racially neutral' assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a 'loaded game board,' affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral."

Applying this doctrine and remembering that "[t]he measure of any desegregation plan is its effectiveness," Davis v. Board of School Commissioners, 402 U.S. 33, 37, 91 S.Ct. 1289, 1292, 28 L.Ed.2d 577 (1971), the court finds that the 1969 plan was inadequate and must be superseded by the new plan.

In accordance with *Swann,* if the implementation of this plan results in full compliance with the *Brown* decision,

then the School Board will be relieved from making further adjustments in school desegregation. 402 U.S. at 31-32, 91 S.Ct. 1267. It is hoped that this plan, coupled with the Board's good faith, will make future adjustments unnecessary by this court's order. Good faith encompasses, *inter alia,* strategically selecting the construction sites of future schools so that desegregation will be enhanced; the number of pupils to be accommodated by new schools; and by the old schools that the School Board decides to abandon. A recurring problem for a court in adopting a desegregation plan is often the foreseeability of resegregation. The Board is therefore charged with the duty of pursuing a school construction and abandonment policy which will in all respects enhance and facilitate desegregation. See *Swann, supra,* 402 U.S. at 20-21, 91 S.Ct. 1267.

The court feels constrained at this point to address briefly the doubts raised by counsel for the School Board concerning the continued quality of public education in the Parish school system. The attitude of the public has all too often reflected an unwillingness to make a short-term sacrifice in public education in order to achieve important long-range goals; namely, an equal education for persons of all races, and, correspondingly, an equal opportunity for all persons to enter the economic mainstream of American life. In this case, however, the burden to be incurred by the defendant School Board in implementing this plan is so de minimis in and of itself and compared with other school desegregation cases that the court does not agree that any decrease in the quality of education should result from this plan. In addition, the guarantee of an equal educational opportunity is in no way limited to the central city of a metropolitan community, but is equally applicable to suburban areas. In other words, suburban school boards are not immunized from the responsibilities of the Four-

teenth Amendment even though it means facing problems that have long beset the adjacent central city.

In accordance with these written reasons, plaintiffs' motion for further relief is granted and the plan submitted by the Jefferson Parish School Board on August 2, 1971, is adopted. The court entered its order to this effect on August 10, 1971.